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No. 93-397

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ASSOCIATED INDUSTRIES OF MISSOURI and
ALUMAX FOILS, INC.,
Petitioners.

v.

JANETTE M. LOHMAN, Director of Revenue, and
DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS,
GARY MARKENSON, THE MISSOURI ASSOCIATION OF
COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE
ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a party which has not alleged any injury resulting from discrepancies between applicable sales and use tax rates within individual taxing jurisdictions has standing to challenge a state tax statute on the ground that those discrepancies violate the Commerce Clause.

2. Whether a statewide use tax which is designed to compensate for varying sales tax rates imposed by local governments throughout the State and which is set at a level well below the average local sales tax rate applied to in-state sales, but which exceeds the lowest local sales tax rate available in the State, discriminates against interstate commerce.

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INTEREST OF THE AMICI

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal

issues that affect state and local governments. Because state and local taxing authority is central to governance and state sovereignty, *see Department of Revenue v. ACF Indus., Inc.*, 62 U.S.L.W. 4097, 4100 (U.S. Jan. 24, 1994), constitutional challenges to the exercise of such authority raise issues of great importance to *amici*.

This case implicates the capacity of States to vest discretionary taxing authority in cities and counties, and the ability of those cities and counties to exercise that authority pursuant to local democratic decisionmaking. Local sales taxes are an increasingly important source of revenue for cities and counties. In fiscal year 1991, local governments in 31 States and the District of Columbia collected general sales taxes totalling over twenty-two billion dollars; this represented the second most important source of local tax revenue that year, with only the property tax generating more revenue. 2 Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism: 1993* Table 59 at 114-15.

Because the imposition of some form of compensatory local use tax is generally necessary to make local taxing authority meaningful and viable for local governments that elect to impose sales taxes, most States authorizing local sales taxes also provide for some sort of local use tax. *See* J.A. 35 ¶ 15 (Stipulation of Facts) ("[a]s of December 31, 1991, twenty-eight states other than Missouri authorized some form of local use tax"); *see generally* American Bar Association Section of Taxation, *ABA Sales & Use Tax Desk Book: 1992-93 Edition* (D. Michael Young & John T. Piper, eds. 1993) (detailing the sales and use tax schemes in each State). Because the issues raised in this case potentially implicate all such local sales and use tax schemes, *amici* submit this brief to assist the Court in its resolution of the case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt respondents' statements of the case and set forth only the following facts of direct relevance to *amici*'s argument.

Missouri law authorizes cities and counties to impose local sales taxes in varying amounts, Pet. App. A-3, but until recently there was no additional use tax to compensate for the sales taxes imposed at the local level. As a result, Missouri's scheme taxed the in-state purchase of an item within any local jurisdiction electing to impose a local sales tax more heavily than the purchase of the identical item from an out-of-state vendor, thereby creating an unfair advantage for out-of-state sellers.

In an effort to redress this imbalance, Missouri enacted RSMo. § 144.748, which provides for the imposition of an additional compensatory use tax of 1.5% statewide ("compensatory use tax"). This compensatory use tax was designed to compensate for the local sales taxes imposed by the local taxing jurisdictions. However, because not all cities and counties have chosen to impose a local sales tax of precisely 1.5% (or, indeed, any local sales tax at all), the compensatory use tax is lower than the local sales tax in some jurisdictions and higher than the local sales tax in others. *See* J.A. 66. Because the vast majority of in-state purchases occur within jurisdictions in which the local sales tax is greater than or equal to 1.5%, the statutory scheme places a higher overall burden on in-state commerce than it does on interstate commerce. *See* Pet. App. A-17.

Based on the fact that the local sales tax within some jurisdictions is lower than the 1.5% compensatory use tax, petitioners brought this Commerce Clause challenge. Petitioner Alumax Foils, Inc. and members of petitioner Associated Industries of Missouri (a trade association) do business in Missouri and are required to pay sales and use taxes on items purchased and used within the State.

J.A. 33 ¶ 4. In addition, some members of petitioner Associated Industries are headquartered in other States, and are required to collect and remit use taxes for items sold across state lines to Missouri customers. *Id.* Neither petitioner has asserted that it or its members have a place of business within any local taxing jurisdiction in Missouri in which the local sales tax is lower than the compensatory use tax. According to stipulation, petitioner Alumax, which is headquartered in St. Louis, has purchased goods from a vendor in St. Francois County, a county in which the local sales tax is less than 1.5%. J.A. 33 ¶ 5.

SUMMARY OF ARGUMENT

Missouri, like a majority of States, has made a legislative choice that is unquestionably within its sovereign power—to afford local governments independent, discretionary authority to levy local sales taxes. Prior to Missouri's enactment of the compensatory use tax at issue here, local governments' exercise of this sales tax authority created a competitive advantage for out-of-state vendors at the expense of local business. *See* Pet. App. A-25; J.A. 95-97. By enacting the compensatory use tax, set at a level well below the average local sales tax imposed on sales within the State, Missouri has sought to "erase"—at least partially—this "tax incentive to engage in interstate commerce." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 243 (1987).

Petitioners' constitutional challenge to Missouri's compensatory local use tax is without merit for two reasons.

1. Petitioners lack standing to bring this Commerce Clause challenge. Their action is narrowly based on the asserted unconstitutionality of discrepancies between local sales and use tax rates within certain of Missouri's taxing jurisdictions. Petitioners have not, however, alleged any injury resulting from those discrepancies.

The injury which petitioners allege is their liability for Missouri's compensatory use tax. But liability for a tax does not in itself constitute a cognizable injury, unless the imposition of the tax violates "a legally protected interest." *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (injury to a "legally protected interest" is part of the "irreducible constitutional minimum" of standing"). Petitioners have not alleged that they have suffered any injury from the feature of the statute's operation which forms the basis for their constitutional challenge—the fact that the compensatory local use tax exceeds the local sales tax within certain of Missouri's local taxing jurisdictions.

Significantly, petitioners have elected not to broadly challenge the power of States to enact local use taxes which compensate for varying local sales tax rates. On the contrary, petitioners have acknowledged the constitutional validity of the sales and use tax systems of numerous other States, including those which provide for identical local sales and use taxes within each local taxing jurisdiction. *See* Pet. Br. 28 & n.16. By doing so, petitioners have implicitly conceded that Missouri's compensatory local use tax operates in a constitutionally unobjectionable manner in all taxing jurisdictions in which the local sales tax is equal to or greater than the 1.5% compensatory local use tax.

Petitioners have never alleged that their liability for Missouri's compensatory use tax has arisen within a jurisdiction in which the compensatory local use tax was higher than the local sales tax, nor have they presented any other allegations that would indicate that discrepancies between sales and use taxes within those jurisdictions have injured or will injure them. Although petitioners present a number of simplistic hypotheticals, they have made no factual allegations that would demonstrate cognizable injury to themselves, or that would trace that injury to the assertedly unconstitutional discrepancies in

sales and use taxes produced by the Missouri compensatory use tax statute. Petitioners do not have standing to challenge an aspect of a statute's operation that does not cause them any harm simply because other, concededly constitutional aspects of that same statute are costly for them.

2. Even if the Court were to find that petitioners have standing, however, their Commerce Clause challenge cannot succeed. The compensatory local use tax challenged here is clearly one that accomplishes the permissible purpose of "eras[ing] a tax incentive to engage in interstate commerce," not one that "affirmatively place[s] interstate commerce at a disadvantage." *See Tyler Pipe*, 483 U.S. at 243. Indeed, Missouri has selected a compensatory use tax rate that continues to afford interstate commerce as a whole an advantage over in-state commerce. *See* Pet. App. A-17.

Petitioners' legal argument to the contrary turns on a faulty premise which has been soundly rejected by this Court—that discrimination in interstate commerce can be judged by looking at individual tax transactions in isolation. *See General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926). Moreover, the fact that petitioners do not point to a single interstate transaction in which they were disadvantaged by the tax discrepancies they challenge makes their proposed "transaction by transaction" test even more strikingly inappropriate as a measure of the Missouri statute's validity. *See Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 542 (1969). Once petitioners' faulty vision of "discrimination" is stripped away, it is clear that Missouri's compensatory use tax statute does not discriminate against interstate commerce. Instead, Missouri has done precisely what the Court has expressly endorsed as constitutionally valid—make interstate commerce pay some measure of its "fair share." *See, e.g., N.W. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959).

In arguing that a statute is always doomed if one can imagine a single instance in which interstate commerce is burdened more heavily than in-state commerce, petitioners ignore two important doctrines that this Court has consistently relied upon in assessing discrimination. First, the Court assesses discrimination by looking at the practical operation of the statute as a whole, rather than by isolating the potential effect on individual transactions or even individual interstate firms. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Second, the Court has recognized that some imprecision in the setting of tax burdens is permissible where complete precision is impossible and important state interests are at stake. *See* cases cited in Part II.B, *infra*.

Here, Missouri's statute clearly does not, in its practical operation, discriminate against interstate commerce. Pet. App. A-17. Moreover, the State's interests could hardly be more important—or more difficult to attain without some degree of imprecision. Given the Court's historical deference to state legislative choices of taxation methods, *see, e.g., Department of Revenue v. ACF Indus., Inc.*, 62 U.S.L.W. 4097, 4100 (U.S. Jan. 24, 1994), Missouri's compensatory use tax should be upheld.

ARGUMENT

I. PETITIONERS DO NOT HAVE STANDING TO RAISE THIS CHALLENGE TO THE CONSTITUTIONALITY OF THE MISSOURI USE TAX BECAUSE THEY HAVE ALLEGED NO INJURY RESULTING FROM THE ASSERTED DISCRIMINATION IN TAX TREATMENT

The injury of which petitioners complain is their liability for Missouri's compensatory use tax, both as Missouri purchasers of out-of-state goods, and, in the case of certain members of Associated Industries, as out-of-state vendors who must collect and remit use taxes for sales to Missouri customers. Pet. Br. 4-5. Without question, petitioners would be advantaged financially if the local use tax law had not been enacted. *See* J.A. 34 ¶ 8 (stipulation that compliance with compensatory use tax will impose "significant economic costs" on petitioners). They have not, however, made factual allegations of injury traceable to the assertedly unconstitutional operation of the statute, and therefore lack standing to bring this constitutional challenge.[2]

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[2] The fact that the Missouri Supreme Court found the petitioners to have standing is not binding here, since the "constitutional and prudential considerations" which comprise federal standing doctrine "respond to concerns that are peculiarly federal in nature." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). The Court has expressly held that, even if a state court is willing to "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory," the Court's "own jurisdiction is cast in terms of 'case or controversy,' [and] we cannot accept as the basis for review . . . any procedure which does not constitute such." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

A. Petitioners' Constitutional Challenge Is Narrowly And Exclusively Focused On Discrepancies Between The Sales And Use Tax Rates Within Individual Taxing Jurisdictions

Standing doctrine requires a plaintiff to do more than identify a costly phenomenon such as the imposition of a tax; it requires the plaintiff to allege that injury to a legally protected interest has resulted (or will result) from an assertedly unconstitutional imposition of the tax. *See Lujan*, 112 S. Ct. at 2136 (setting forth elements of "irreducible constitutional minimum" of standing). In other words, there must be an injury that is both legally cognizable and "fairly traceable to the assertedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 752-53 (1984); *Lujan*, 112 S.Ct. at 2136. As a preliminary matter, therefore, it is necessary to identify with clarity the specific "assertedly unlawful conduct" complained of by petitioners.

An examination of petitioners' constitutional challenge to Missouri's sales and use tax scheme reveals that it is quite narrowly drawn, focusing exclusively on those taxing jurisdictions in which the local sales tax is lower than Missouri's compensatory use tax. Petitioners' entire Commerce Clause argument is built around repeated references to these jurisdictions, *see, e.g.*, Pet. Br. i, 10, 12, 14, 17, 26, 28, and is devoid of any indication that the operation of Missouri's compensatory use tax is constitutionally objectionable within those jurisdictions in which the use tax is equal to or lower than the prevailing local sales tax. *See* J.A. 93-94 (petitioners maintain that "the discrimination is with respect to those areas of the state where the local sales tax rate is less than the local use tax rate").

Significantly, petitioners do not question Missouri's authority to afford local governments independent, discretionary taxing authority, nor do they contest the constitutionality of compensatory local use taxes generally. Indeed, petitioners expressly acknowledge the constitu-

tionality of local sales and use tax schemes adopted by numerous other States, such as those in which cities and counties are given discretion to impose matching local sales and use taxes. *See* Pet. Br. 28 & n.16.

Nor is petitioner contesting the constitutionality of differing tax rates between jurisdictions. Petitioners describe state schemes which give local governments discretion to levy equivalent sales and use taxes as "within the clearly delineated bounds outlined in cases from this Court," Pet. Br. 28, even though differing tax rates among taxing jurisdictions are virtually inevitable under such schemes. *See generally* American Bar Association Section of Taxation, *ABA Sales and Use Tax Desk Book: 1992-93 Edition* (D. Michael Young and John T. Piper, eds. 1993) (state-by-state survey of sales and use taxes with tables indicating varying tax rates among local jurisdictions).

The asserted constitutional infirmity identified by petitioners is, therefore, an extremely narrow one: Missouri's uniform compensatory use tax results in discrepancies between local sales and use taxes *within individual taxing jurisdictions*. It is these *intra*jurisdictional discrepancies, in which the local sales tax is lower than the local use tax within the same jurisdiction, which petitioners assert are unconstitutional. Put another way, petitioners are arguing that Missouri's compensatory use tax is unconstitutional only insofar as it exceeds the local sales tax rate in certain jurisdictions.

B. Petitioners Do Not Have Standing Because They Have Not Alleged Any Cognizable Injury Resulting From The Assertedly Unconstitutional Discrepancies Between Sales and Use Taxes Within Individual Jurisdictions

As discussed above, petitioners' constitutional objection clearly does not encompass *all* impositions of Missouri's compensatory use tax; to the extent those impositions do not exceed the prevailing local sales tax in the

jurisdiction, they are implicitly conceded to be entirely proper and unobjectionable. Because of the limited scope of petitioners' constitutional challenge, their allegation that they are required to pay Missouri's compensatory use tax is inadequate to establish cognizable injury, and hence their standing.

Petitioners have not alleged that they have been or ever will be liable for the compensatory use tax within a jurisdiction in which that tax rate exceeds the local sales tax rate. *See* J.A. 7-8, ¶¶ 7-8; J.A. 33 ¶¶ 4-5; J.A. 34 ¶¶ 7-8; Pet. Br. 4-5. This is unsurprising, since use taxes are ordinarily imposed at one's business location, and petitioners have not alleged that they or Associated Industries' members are located in any jurisdiction in which Missouri's compensating use tax exceeds the local sales tax. Petitioners have not, therefore, made any allegations indicating that Missouri's compensatory use tax scheme has subjected any of their out-of-state purchases to a heavier tax burden than would be placed on the local purchase of the same goods. Nor has petitioner Associated Industries alleged that its out-of-state members have suffered any injuries attributable to intrajurisdictional discrepancies in sales and use tax rates within Missouri.[3] In the absence of any such allegations of disadvantage, there can be no basis for concluding that discrimination exists. *See Dunbar-Stanley Studios*, 393 U.S. at 542.

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[3] Associated Industries has not indicated where within Missouri its out-of-state members make sales, nor has it made any specific allegations about the impact of Missouri's compensatory use tax on its out-of-state members or their customers. *See* Resp. Br. Lohman 5 n.10. But even if members of petitioner Associated Industries had customers in jurisdictions where the compensatory local use tax exceeded the local sales tax, the harm to those members associated with possible lost sales to such customers would likely be outweighed by the effect of the advantage the Missouri tax scheme gives to out-of-state sales in all of the jurisdictions in which the use tax is lower than the sales tax.

Petitioners have failed to allege any cognizable injury that can be traced to the assertedly unconstitutional feature of the statute—the fact that it sometimes results in a higher use tax than the local sales tax within a particular jurisdiction. Because they have not alleged that the assertedly unconstitutional feature has injured them, they cannot raise this challenge to the validity of the Missouri law. *Cf. Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (in challenge to tax which did not permit deduction of out-of-state losses, the Court pointed out "that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question").

Because petitioners have failed to satisfy the core constitutional requirements of standing, *see Lujan*, 112 S.Ct. at 2136, they have presented no case or controversy capable of being adjudicated in this Court.[4] Instead, they seek to challenge a statute by identifying an assertedly unconstitutional feature, without alleging that this feature has had any negative effect on them at all.[5]

[4] The causation element of the standing test also requires that the injury result from the "challenged action of the defendant, and not . . . from the independent action of some third party not before the Court." *Simon v. Eastern Ky. Wel. Rights Org.*, 426 U.S. 26, 41-42 (1976); *see also Lujan*, 112 S.Ct. at 2136. Here, the discrepancies of which petitioners complain do not result solely from the action of the respondent Director of Revenue in collecting Missouri's 1.5% local use tax; they arise *only* where that action coincides with the independent action of a local taxing jurisdiction in setting a local sales tax rate of less than 1.5%. However, it is unnecessary in this case to determine whether the action of the named defendant "caused" the discrepancies of which petitioners complain, since petitioners have failed to show that those discrepancies caused them any injury.

[5] The cases cited by petitioners in support of their standing, *see* Pet. Br. 17 n.9, are readily distinguishable. In both *Tyler Pipe*, *supra*, and *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the parties bringing the action were direct victims of the very discrimination they were challenging; they were forced to pay a tax that others similarly situated were not required to pay. Here, in contrast, petitioners have not shown that they are affected at all

Petitioners' lack of standing to challenge intrajurisdictional tax rate discrepancies becomes even clearer when the effect on petitioners of eliminating those discrepancies is considered. Petitioners have made no allegations that would indicate they would be relieved of *any* portion of their current use tax burden if the assertedly unconstitutional elements of the use tax statute were removed (*i.e.*, if local use tax rates were adjusted so that they in no case exceeded the local sales tax rate within a jurisdiction). Instead, it appears petitioners would be no better off if Missouri were required to make the local use tax in each jurisdiction precisely match the local sales tax.

It is true that petitioners would be benefitted if the declaratory and injunctive relief they seek were granted, since the complete invalidation of Missouri's compensatory use tax statute would relieve them of a tax burden and potentially improve their competitive position. In this sense, their "injury"—having to pay the tax—would be "redressed." However, there is no indication that petitioners have been or ever will be affected by anything other than concededly constitutional impositions of the compensatory use tax (*e.g.*, where tax liability for the use tax arises within a jurisdiction in which the local sales tax rate is 1.5% or greater). Consequently, the benefit they would receive from invalidation of the statute would be a windfall resulting from the judicial review process, not redress for their constitutional complaints.

The sole specific example of "injury" in the record illustrates this point. The parties have stipulated that petitioner Alumax makes purchases from a vendor located in St. Francois County, a county in which the local sales

by the assertedly unconstitutional discrepancies between tax rates of which they complain. They are forced to pay the compensatory use tax, to be sure, but they have not shown that the tax scheme has ever operated so as require them to pay a higher tax rate than that imposed on others similarly situated (*e.g.*, those within the same taxing jurisdiction who purchase goods locally, rather than from out of state).

tax is lower than Missouri's compensatory use tax. J.A. 33 ¶ 5. If Missouri were to enact new legislation that made the local use tax precisely equal to the sales tax in each and every taxing jurisdiction (a legislative scheme which petitioners have acknowledged to be constitutional, *see* Pet. Br. 28 & n.16), the local use tax in St. Francois County would be reduced to match the local sales tax there, but the local use tax in St. Louis (where Alumax is headquartered) would remain at 1.5%, since the local sales tax in St. Louis is 1.5%. There is no indication the reduced use tax in St. Francois County would have any effect on Alumax, since Alumax is not located there. Instead, the St. Louis use tax rate of 1.5% would be imposed on Alumax's out-of-state purchases. Alumax would still be in a position to buy a product in St. Francois County at a lower sales tax rate than the use tax rate applicable to its out-of-state purchase of the same product (*i.e.*, the St. Louis use tax rate of 1.5%).

Unable to demonstrate any real harm to themselves resulting from intrajurisdictional differences in sales and use tax rates, petitioners of necessity resort to the invention of hypothetical scenarios involving an imaginary cast of characters (who, not incidentally, bear no resemblance to themselves). The Court is asked to invalidate Missouri's statute because of the hypothetical plight of the "Washington apple grower [required] to charge more tax than his local counterpart on sales into Dunklin County," Pet. Br. 26, the "Kentucky merchant, shipping washing machines into Dunklin County," Pet. Br. 12, or the "Illinois mail-order house which sells a computer to a resident of Dexter or Kennett." Pet. 10. In making up their hypotheticals, petitioners have ignored the complicating factors that would arise in any real-life situation —such as the fact that these out-of-state vendors would enjoy a competitive advantage vis-a-vis their local competitors on sales into all of the cities and counties in which the local sales tax is higher than 1.5%. *See* Resp. Br. Lohman 12 n.16. These hypothetical scenarios merely

highlight petitioners' inability to allege injury to themselves sufficient to confer standing and are a patently insufficient basis for adjudicating the constitutionality of Missouri's compensatory use tax. *See, e.g., Arkansas Electric Coop. v. Arkansas Pub. Ser. Comm'n*, 461 U.S. 375, 395 (1983); *Hampton v. St. Louis*, 227 U.S. 456, 468-69 (1913).

Because the practical effects of a challenged statute are determinative in the Commerce Clause context, the theoretical potential for discrimination against interstate commerce is plainly insufficient. In *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932), the Court explained that "[d]iscrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Id.* at 481. Because petitioners have alleged no injuries resulting from the asserted discrimination, there is no basis for adjudicating the Commerce Clause issues they raise. Their "unadorned speculation" about the harm that might result in hypothetical situations is plainly "not suffic[ient] to invoke the federal judicial power." *Simon*, 426 U.S. at 44.

II. MISSOURI'S COMPENSATORY USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

A. Discrimination Under The Commerce Clause Turns On The Practical Effect Of The Statutory Scheme On Interstate Commerce As A Whole, Not On Its Possible Impact On Individual Transactions

Petitioners assert that Missouri's compensatory use tax discriminates against interstate commerce. To make this assertion, however, they must infuse the word "discrimination" with a novel "transaction by transaction" meaning. The starting point in analyzing whether Missouri's statute unconstitutionally discriminates against interstate commerce in the manner asserted by petitioners is to con-

sider the way in which the Court has defined and assessed "discrimination" in this context. This examination demonstrates that petitioners' Commerce Clause theory cannot be squared with this Court's precedents.

"Discrimination, like interstate commerce itself, is a practical conception." *Gregg Dyeing*, 286 U.S. at 481. Accordingly, the Court has repeatedly emphasized that a state taxing statute's validity under the Commerce Clause must be tested by its practical operation. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court reaffirmed its central duty where a tax is challenged under the Commerce Clause:

> "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations.

Id. at 69 (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)); *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) ("[t]he principal focus of inquiry must be the practical operation of the statute").

The Court's focus on the practical operation of challenged statutes has led it to reject Commerce Clause challenges based on formal, rather than practical, distinctions in treatment. For example, in *Gregg Dyeing* the Court held that the appellants had not sustained their burden of showing discrimination since they "failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact." 286 U.S. at 482, *quoted in Henneford v. Silas Mason Co.*, 300 U.S. 577, 585 (1937). *See also Halliburton Oil*, 373 U.S. at 70 ("equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions").

Related to the Court's concern with practical effects is its explicit instruction that the constitutionality of state taxes be evaluated based on the effects of the statutory scheme as a whole. "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). *Cf. Washington v. United States*, 460 U.S. 540, 542 (1983) (in assessing whether tax statute improperly discriminated against federal government, Court reiterated "that a determination whether a tax is discriminatory 'requires an examination of the whole tax structure of the state' ") (citations omitted).

Ignoring these fundamental precepts, petitioners have asked the Court to adopt a novel transaction by transaction approach to assessing discrimination against interstate commerce. Their approach would require a state tax statute to be invalidated whenever a single transaction could be imagined in which a heavier tax burden would be placed on an out-of-state sale than on an in-state sale. Nothing in this Court's Commerce Clause precedents supports such an approach to the meaning of proscribed "discrimination." On the contrary, the Court assesses discrimination against interstate commerce by looking at the overall effect of a challenged statutory scheme. While it is true that even a relatively small overall effect may in some circumstances be sufficient for the invalidation of a statute, *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the net effect must be adverse to interstate commerce generally.

All of the cases upon which petitioners rely are distinguishable from the Missouri statute in that the discrepancies in treatment, in each and every instance in which they occurred, all had an adverse impact on interstate commerce.[6] Because there were no countervailing

[6] This is not, of course, to say that each and every transaction occurring under the challenged statutory schemes produced dis-

instances in which interstate commerce was favored, it was not necessary for the Court to engage in any balancing or weighing to determine the overall effect of the statute. The differences in treatment systemically and consistently favored in-state interests over interstate commerce, and the overall effect was unambiguously discriminatory.

Where, as here, the state scheme tends in two directions, but in net effect produces no adverse impact on interstate commerce, the Court has indicated there is no constitutionally cognizable discrimination. In *Kraft General Foods v. Iowa Dept. of Revenue*, 112 S.Ct. 2365 (1992), the Court said, in the context of a foreign Commerce Clause challenge, that "[i]f [it were] true" that "Iowa's tax system does not favor business activity in the United States *generally* over business activity abroad . . . . this would indeed suggest that the statute does not discriminate against foreign commerce." *Id.* at 2370 (emphasis added). The Court's statement in *Kraft* regarding the necessity of judging discrimination by its *general* effect is but the most recent restatement of the Court's longstanding approach to assessing the constitutionality of tax treatment. The Court had previously applied this same principle to uphold state taxation schemes squarely analogous to the one at issue here against allegations that they unconstitutionally discriminated against out-of-state interests.

In *Travellers' Insurance Co. v. Connecticut*, 185 U.S. 364 (1902), the Court affirmed the validity of a tax scheme similar to the one at issue here in the context of

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crimination—in some instances interstate commerce and in-state commerce were treated the same. *See* Br. *Am. Cur.* Wash. Legal Found. 9 n.4. But in each instance in which discrimination *did* occur, it favored in-state interests over interstate transactions. There was not, as here, any countervailing "discrimination" in favor of interstate commerce to weigh against discrimination tending in the opposite direction.

a Privileges and Immunities Clause challenge.[7] The tax statute at issue in *Travellers* imposed a uniform statewide tax rate on nonresident stockholders, but made the varying local tax rates applicable to resident stockholders. The Court upheld the tax scheme as nondiscriminatory, even though the local tax rates were in some cases higher and in some cases lower than the uniform tax rate imposed on nonresidents. Specifically rejecting exactly the type of transaction by transaction analysis petitioners advocate, the *Travellers* Court explained that "[y]ou cannot put one resident against one nonresident stockholder, and by a comparison of their different burdens determine the validity of the legislation." *Id.* at 369.

In *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), the Court applied a similar overall effects test to uphold another tax scheme squarely analogous to Missouri's against Commerce Clause and Equal Protection Clause challenges. There, the tax assessed on nonresidents was, taken as a whole, found to be "substantially the equivalent" of the various local taxes imposed on residents. *Id.* at 373. *See also Austin v. New Hampshire*, 420 U.S. 656, 664-65 (1975) (in the context of a Privileges and Immunities Clause challenge, Court con-

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[7] *Amici*'s references within this brief are to the Privileges and Immunities Clause contained in Article IV. The analysis contained in cases involving the Article IV Privileges and Immunities Clause can be expected to be highly instructive, if not dispositive of the Commerce Clause question presented here, given the fact that the two clauses have a common historical origin and the same core purpose. The Court has repeatedly acknowledged this closely linked history, and has used it as a basis for applying Commerce Clause analysis to Privileges and Immunities Clause questions. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2 and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism") (footnote and citation omitted); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279-80 & nn. 7-8 (1985) (same). *See generally* Gerald Gunther, *Constitutional Law* 281-82 (12th ed. 1991).

trasted a statutory scheme whose burden "falls exclusively on the income of nonresidents [and is] not offset even approximately by other taxes imposed upon residents alone" with the one at issue in *Travellers,* in which "the nonresident . . . was called upon to make no more than his ratable contribution to the support of the state government") (footnote omitted).

Likewise, in *Dunbar-Stanley Studios*, the Court upheld taxes imposed on transient, out-of-state photographers on a city by city basis, despite the fact that those taxes could under certain circumstances exceed the tax imposed on photographers with a fixed location within the State. There, the Court found it important that the petitioner had not alleged that the system of taxation had actually worked to its disadvantage: "In none of the cities for which appellants' complaint gives the details of its activities would the transient tax imposed on it have exceeded that which a fixed-location photographer would have had to pay to operate in the city." 393 U.S. at 542. The same defect is present here as well, *see* Part I, *supra,* making it especially clear that there is no basis for using petitioners' transaction by transaction test.

The Court's Commerce Clause jurisprudence thus assesses discrimination by examining the impact of a challenged law on interstate commerce as a whole. Of course, the case law also recognizes that individuals may benefit, both as consumers and as vendors, as a result of the Commerce Clause's preclusion of Balkanization and economic warfare among the States. *See Dennis v. Higgins,* 498 U.S. 439, 449 (1991). Because individuals are among the beneficiaries of the system "fostered by the Commerce Clause," and are within the "zone of interests" protected by that Clause, the Court has held that individuals may bring a Commerce Clause action under Section 1983. *Id.* at 449-51 (citations omitted). Such a remedy is available to individuals, however, only insofar as the challenged legislation violates the substantive constitutional

limits set forth by the Court; that is, where it has an adverse impact on interstate commerce as a whole.

The fact that the Commerce Clause helps foster a constitutional system that protects individual interests does not, however, translate into the extreme substantive constitutional mandate that petitioners advocate: that any state statute which disadvantages a single individual or business, within the context of a single transaction, must therefore be invalidated without further inquiry, regardless of whether interstate commerce is adversely affected. Instead, the Commerce Clause works in conjunction with other constitutional protections, such as the Privileges and Immunities Clause and the Equal Protection Clause, to protect a system of incentives and expectations regarding trade which will benefit vendors and consumers alike.[8]

In the context of the Commerce Clause, this protection of individual expectations thus occurs as an incident to the Commerce Clause's embodiment of "the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada, Inc. v. Florida Dep't of Revenue,* 477 U.S. 1, 8 (1986). Hence, the Commerce Clause's substantive protections, as set forth in this Court's decisions, operate to safeguard individuals' expectations of free access to all markets by safeguarding interstate commerce generally. This does not, however, equate to a substantive guarantee of precise equality in treatment with regard to each and every transaction in which an individual might engage.

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[8] Indeed, the Court has outlined something of a division of labor between these various constitutional provisions. *See Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 881 (1985) (Commerce Clause and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.") (footnote omitted).

Consistent with this approach, the Court has, of course, at times referred to the impact on *representative* "individuals" in testing the effects of a state statute. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977), the Court noted that "[i]n all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make the choice without regard to the tax consequences." Similarly, in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937), the Court found a sales and use tax scheme valid since "[w]hen the account is made up, the stranger from afar is subject to no greater burden than the dweller within the gates." Such illustrative examples are analytically useful where a statute's effect on one sample individual can indeed stand for the overall effect on individuals of that class generally. But looking at a statute's effect from the standpoint of a given "individual" as a way of assessing a statute's effect on interstate commerce as a whole makes little sense where various individuals and businesses are affected in different and opposing ways by the statute. Petitioners cite no case, nor are *amici* aware of any, in which the Court has ever suggested that this tool for analyzing discrimination be used in such a context, or that it be elevated to an enforceable constitutional guarantee that the burdens placed on every imaginable in-state and out-of-state transaction actually be equivalent for each and every imaginable individual or business.[9]

[9] Similar reasoning applies to the Court's statement in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." This statement cannot mean, as petitioners suggest, that the identification of a single transaction occurring across state lines which carries a heavier burden than a similar transaction within state lines leads to automatic invalidation of the statute; instead, the natural meaning of this statement, viewed in light of the Court's other pronouncements in the Commerce Clause area, is that a State may not set up a statutory scheme that operates to tax a type of transaction more heavily simply by virtue of the fact that it involves interstate commerce. Here, Missouri's burden on a type of transaction involving interstate commerce (the use of goods) is far *lighter* than the burden it places on another type of transaction occurring within state lines (the sale of goods). Pet. App. A-17.

Petitioners insist that their transaction by transaction approach to assessing discrimination is necessary, since any other rule would allow one out-of-state vendor (such as the Kentucky washing machine merchant) to be disadvantaged by the statute as long as that disadvantage was made up for by the gains of another out-of-state vendor (such as the Iowa refrigerator seller). *See* Pet. Br. 12. Even if such a disadvantaged party were properly before the Court, the Court has clearly indicated that the Commerce Clause "protects the interstate market, not particular interstate firms." *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)); *see Arkansas Elec. Coop.*, 461 U.S. at 390 (part of "general trend in our modern Commerce Clause jurisprudence" is looking at " 'the effect of the regulation upon the *national interest* in the commerce.' ") (emphasis added) (quoting *Illinois Gas Co. v. Pub. Serv. Co.*, 314 U.S. 498, 505 (1942)). *Cf. Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940) (in assessing whether discrimination against national banking associations was present, Court held that "[d]iscrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations").

In *Exxon*, the fact that a state regulation would cause three refiners to stop selling within the State was viewed as irrelevant, since the statute had "no impact on the relative proportions of local and out-of-state goods sold in Maryland and indeed, no demonstrable effect whatsoever on the interstate flow of goods." *Id.* at 126 n.16. Hence, "[t]he fact that the burden of a state regulation falls on

some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* at 126. Here, as in *Exxon*, there is nothing in the record that indicates any negative effect on the flow of goods resulting from discrepancies between sales and use taxes within Missouri jurisdictions.[10]

B. The Court Has Permitted Some Imprecision In Tax Burdens Where Necessary To Advance Important State Interests

1. *States Have An Important Interest In Affording Local Governments Authority To Set Local Sales Tax Rates*

State authority over taxation lies at the core of state sovereignty. *ACF Indus.*, 62 U.S.L.W. at 4100. This authority necessarily includes state legislative choices as to whether, and in what manner, cities, towns and counties will be given independent taxing discretion. In *General American*, the Court indicated that a state legislature's decision to grant local taxing authority "is a matter within the competency of the state Legislature," and indicated that it would not concern itself "with the particular method adopted by Louisiana of allocating the tax between the state and its political subdivisions." 270 U.S. at 372 (citing *Columbus Southern Ry. Co. v. Wright*, 151 U.S. 470, 475-76 (1894)); *cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973) (in context of an equal protection challenge, Court declined to "condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests," noting that to do so would

[10] Of course, some change in the movement of goods across state lines would be expected since the introduction of the compensatory use tax was designed to correct for what was previously an unfair advantage granted to interstate commerce (resulting from the much heavier burden imposed on in-state sales through the various local sales taxes).

be to "intrude in an area which [the Court] has traditionally deferred to state legislatures").

Despite the States' strong interest in granting sales tax authority to local governments (and the local governments' interest in having such authority in order to implement locally-based democratic choices), a local sales tax is typically not a meaningful option unless some compensatory local use tax can also be imposed to equalize the burdens on in-state and out-of-state transactions. Otherwise, a local electorate's choice to enact a sales tax is made only at the price of losing local business to out-of-state vendors, to whom no local sales tax need be paid. Thus, it is not surprising that most of the States which have authorized local governments to levy local sales taxes have also authorized some form of compensatory local use tax. *See* J.A. 35 ¶ 15 (stipulating that in 1991, 28 States other than Missouri provided for some sort of local use tax).

These compensatory local use taxes represent nothing more than attempts to make interstate commerce pay its "fair share"—a goal the Court has long deemed entirely legitimate. *See, e.g., N.W. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959) ("it is axiomatic that the founders did not intend to immunize such [interstate] commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State"); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

The State's interest in making interstate commerce pay its "fair share" is, of course, no less pressing simply because the State has elected to delegate some of its taxing authority to local governments. But, as the Court has

noted, when a state legislature chooses to do this, tax rates in the various cities, towns and counties will necessarily vary "according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government" and the democratic choices of their citizens. *Travellers,* 185 U.S. at 367. This is the desired, expected, and virtually inevitable result of granting taxing discretion to local governments. *See generally ABA Sales and Use Tax Desk Book.* The existence of these varying local tax rates complicates States' efforts to collect a "fair share" from interstate commerce.

2. *Absolute Precision As To Every Transaction Is Not Constitutionally Required Where There Is No Overall Burden on Interstate Commerce*

The Court has long recognized that making interstate commerce pay its fair share, without subjecting it to unfair or duplicative burdens, calls for practical accommodations. *See Western Live Stock,* 303 U.S. at 259. In *Western Live Stock,* the Court upheld a local tax which had an incidental impact on interstate advertising, holding that the challenged tax

> finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate commerce shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business.

Id. at 258.

The need for such practical accommodations is heightened where, as here, a State has chosen to vest taxing authority in local governments. For, as the Court has recognized, some imprecision in burdens is inevitable when local taxing jurisdictions adopt varying rates. As the Court explained in *Travellers,* "[i]t does not seem possible to adjust, with unerring certainty, all the varying

burdens which grow out of the fact that some of the stock of the various state corporations is held outside of the state and some within the state and the latter in separate municipalities with different rates of taxation." 185 U.S. at 369-70.

In upholding the State's tax system over the objection that some inequalities in tax burdens would remain in certain instances, the *Travellers* Court emphasized that "[a]bsolute equality in taxation can never be attained," and that "[p]erfect equality and perfect uniformity of taxation as regards individuals or corporations . . . is a dream unrealized." *Id.* at 371-72 (citations omitted).[11] In *General American,* the Court similarly concluded that imprecisions in tax burdens with respect to certain individuals or transactions were not fatal. "Where the taxing statute, which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." 270 U.S. at 373. This holding is controlling here.

Moreover, in subsequent cases the Court has repeatedly indicated in related contexts that some inexactness in the imposition of tax burdens is permissible, especially where, as here, alternatives have been shown to be administratively cumbersome. For example, in *American Trucking Ass'n, Inc. v. Scheiner,* 483 U.S. 266, 296 (1987), the Court struck down a flat tax with discrimina-

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[11] *Cf. Rodriguez,* 411 U.S. at 41 ("No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."); *Illinois Cent. R.R. Co. v. Minnesota,* 309 U.S. 157, 161 (1940) (In the context of an equal protection challenge to a tax statute, the fact "[t]hat the apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system.") (footnotes omitted).

tory effects while at the same time reaffirming that "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." *See id.* at 296 n.26 (because of "the administrative impossibility of precise apportionment according to road use," a tax based on vehicles' fair market value was upheld "as a rough approximation of use" in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546 (1950)).

Here, Missouri has demonstrated that substantial administrative burdens would attend the use of other alternatives, such as "matching" sales and use tax rates within each jurisdiction. *See* J.A. 69-85 (Stipulation of Facts, Exh. H). But, more importantly, even if sales and use tax rates could be equalized within each jurisdiction, as petitioners suggest they should be, some inexactness in tax burdens would remain. *See* Pet. App. A-18 (citing *American Modulars Corp. v. Lindley*, 376 N.E.2d 575, 577-78 (Ohio), *cert. denied*, 439 U.S. 911 (1978)).[12] Hence, even the alternative that they endorse as constitutionally permissible would be incapable of meeting their own erroneous transaction by transaction test.

[12] In *American Modulars*, the Ohio Supreme Court struck down a local sales and use tax statute despite the fact that sales and use taxes matched within each taxing jurisdiction. The Court reasoned that the scheme violated the Commerce Clause because an individual might travel to a jurisdiction with a lower tax rate than their "home" jurisdiction and thereby make an in-state purchase that would be taxed less heavily than an out-of-state purchase would be. *See American Modulars*, 376 N.E.2d at 577 & n.5. *Amici* submit that the *American Modulars* decision is erroneous and that the tax scheme at issue there was plainly constitutional; indeed, the petitioners in this case indicate that a tax scheme which equalizes local sales and use taxes within each jurisdiction is constitutionally unobjectionable. Pet. Br. 28 & n.16. Yet, as *American Modulars* illustrates, even such constitutional schemes result in some inexactness when examined on a transaction by transaction basis.

In sum, there is no workable way for States to attain absolute precision in tax burdens with respect to all transactions, while at the same time allowing local jurisdictions meaningful taxing authority and making interstate commerce pay its "fair share." However, Missouri has selected a means of apportioning burdens which, under this Court's precedents, presents no unconstitutional discrimination against interstate commerce.[13]

Given this, it is not necessary to determine whether the alternative of matching local sales and use taxes would provide a closer (although still imperfect) approximation. The Court has repeatedly expressed its reluctance to interfere with a State's choice of taxation methods, especially where, as here, no "perfect" alternative exists. *See, e.g., Travellers*, 185 U.S. at 371. The same reasoning should govern here.

[13] Given the great importance of the State's interest in permitting local governments to exercise independent taxing authority, and the inability to achieve that goal without generating some inexactness in tax burdens, Missouri's statute should be upheld even if the Court were to find that it was discriminatory. In *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), the Court explained: "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 278; *see also Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992); *Maine v. Taylor*, 477 U.S. 131, 140-52 (1986) (upholding a state statute analyzed under this standard).

CONCLUSION

The writ of certiorari should be dismissed for lack of standing. In the alternative, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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